

John A. V. Nicoletti  
Nooshin Namazi  
Kevin J.B. O'Malley  
NICOLETTI HORNIG & SWEENEY  
*Attorneys for Plaintiffs*  
*The Northern Assurance Company of America*  
*and American Home Assurance Company*  
Wall Street Plaza  
88 Pine Street, Seventh Floor  
New York, New York 10005  
(212) 220-3830

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
THE NORTHERN ASSURANCE COMPANY  
OF AMERICA and AMERICAN HOME  
ASSURANCE COMPANY,

**08 CV 3289 (CSH) (AJP)**

Plaintiffs,

- against -

LAFARGE NORTH AMERICA, INC. and  
AMERICAN STEAMSHIP OWNERS MUTUAL  
PROTECTION AND INDEMNITY  
ASSOCIATION, INC.

**Electronically Filed**

Defendants.

-----X

**DECLARATION OF JOHN A.V. NICOLETTI  
IN OPPOSITION TO MOTION TO DISMISS**

Pursuant to 28 U.S.C. § 1746, JOHN A.V. NICOLETTI declares under penalty of perjury  
as follows:

1. I am a member of Nicoletti Hornig & Sweeney, attorneys for Plaintiffs The Northern Assurance Company of America and American Home Assurance Company in the above-captioned action. I have been the partner responsible for this matter from the beginning and, as such, I am fully familiar with all prior proceedings herein.

2. I make this declaration in opposition to Defendant Lafarge North America, Inc.'s ("Lafarge") motion to dismiss this action and in opposition to the memorandum of law submitted by American Steamship Owners Mutual Protection and Indemnity Association, Inc. (the "American Club" or "Club") in support of Lafarge's motion.

3. Attached hereto as Exhibit "1" is a true and correct copy of the ratification of New York Marine and General Insurance Company ("NYMAGIC") that was filed herein.

4. In its ratification, NYMAGIC states that it intends to file a motion to intervene in this action as a plaintiff. *See* Exhibit "1" ¶ 9.

5. In light of NYMAGIC's anticipated motion, I requested Lafarge and the Club to withdraw those parts of the motion to dismiss based upon NYMAGIC's absence in this action and to consent to NYMAGIC's request to intervene as a plaintiff. Lafarge and the Club declined both requests.

6. Attached hereto as Exhibit "2" is a true and correct copy of an e-mail exchange between and among myself and, *inter alia*, counsel for Lafarge and the Club in which counsel for Lafarge indicates that his client will not consent to NYMAGIC's request to intervene in this action as a plaintiff.

7. Attached hereto as Exhibit "3" is a true and correct copy of an e-mail exchange between and among myself and, *inter alia*, counsel for Lafarge and the Club in which counsel for the Club indicates that his client will not consent to NYMAGIC's request to intervene in this action as a plaintiff.

8. I declare under penalty of perjury that the foregoing is true and correct.

Executed: July 2, 2008  
New York, New York

/s John A. V. Nicoletti  
JOHN A.V. NICOLETTI

# **EXHIBIT**

**"1"**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
THE NORTHERN ASSURANCE COMPANY  
OF AMERICA and AMERICAN HOME  
ASSURANCE COMPANY,

Plaintiffs,

- against -

**08 CV 3289 (CSH) (AJP)**

LAFARGE NORTH AMERICA, INC. and  
AMERICAN STEAMSHIP OWNERS MUTUAL  
PROTECTION AND INDEMNITY  
ASSOCIATION, INC.

**Electronically Filed**

Defendants.  
-----X

**RATIFICATION OF  
NEW YORK MARINE AND GENERAL INSURANCE COMPANY**

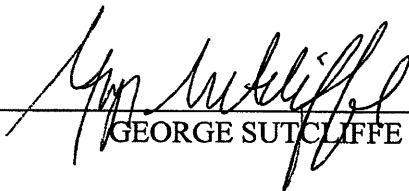
George Sutcliffe declares and states as follows:

1. I am a Senior Vice President of Mutual Marine Office, Inc. ("MMO").
2. MMO is the authorized representative of New York Marine and General Insurance Company ("NYMAGIC").
3. NYMAGIC, Northern Assurance Company of America ("Northern Assurance") and American Home Assurance Company ("American Home") subscribed, on a several and not joint basis, to an Excess Marine Liability Policy issued to Lafarge North America, Inc. ("Lafarge") for the period from May 1, 2005 to May 1, 2006 (the "Excess Policy").
4. NYMAGIC subscribed to 40% of the risk under the Excess Policy.
5. Northern Assurance subscribed to 35% of risk under the Excess Policy.
6. American Home subscribed to 25% of the risk under the Excess Policy.
7. NYMAGIC is the lead underwriter under the Excess Policy.

8. Pursuant to Rule 17(a) of the Federal Rules of Civil Procedure, MMO, on behalf of NYMAGIC, hereby ratifies the commencement and prosecution of the above-captioned action by Northern Assurance and American Home on behalf of all of the underwriters subscribing to the Excess Policy, including NYMAGIC, and agrees to be bound by a final judgment in said action after all appeals have been exhausted or the time to appeal has expired, as applicable..

9. NYMAGIC intends to file a motion with the Court, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to intervene in the above-captioned action as a plaintiff.

Dated: New York, New York  
June 26, 2008

  
\_\_\_\_\_  
GEORGE SUTCLIFFE

# **EXHIBIT**

**"2"**

**John A. V. Nicoletti**

---

**From:** Anthony J. Pruzinsky [APruzinsky@hillrivkins.com]  
**Sent:** Friday, June 27, 2008 10:10 AM  
**To:** John A. V. Nicoletti; Robert G. Clyne; jwoods@tpwlaw.com  
**Cc:** Nooshin Namazi; David H. Fromm; Kevin O'Malley  
**Subject:** RE: LaFarge

John, we confirm that our client will not stipulate to the addition of NYMAGIC as a party plaintiff, so it appears you will have to make the motion.  
Tony

Anthony J. Pruzinsky  
Hill Rivkins & Hayden LLP  
45 Broadway, Ste. 1500  
New York, N.Y. 10006  
Tel: 212-669-0600 (Direct -0639)  
Fax: 212-669-0698/0699  
Mobile: 201-562-9004  
E-mail: apruzinsky@hillrivkins.com

-----Original Message-----

**From:** John A. V. Nicoletti [mailto:JNicoletti@nicolettihornig.com]  
**Sent:** Friday, June 27, 2008 8:58 AM  
**To:** Robert G. Clyne; jwoods@tpwlaw.com  
**Cc:** Anthony J. Pruzinsky; Nooshin Namazi; David H. Fromm; Kevin O'Malley  
**Subject:** FW: LaFarge

Dear Bob and John: To start the day on a good note, pls. see the attachment which is a ratification of our clients' declaratory action by NYMAGIC. This is also to request your collective consent to permit NYMAGIC by stipulation to be added as a named plaintiff. Absent your consent, NYMAGIC will move to intervene in the instant declaratory action.

In light of this development, it would be appropriate for each of you to withdraw those sections of your respective motions to dismiss which relate to NYMAGIC's not authorizing the action as lead excess insurer, failure to name an indispensable party, alleged breach of contract and the like. Once NYMAGIC is added as a plaintiff, it would also be appropriate for each to file amended answers withdrawing those affirmative defenses which related to NYMAGIC not appearing in the action, breach of the leader clause and the like.

If anyone has any questions, please feel free to contact the undersigned.

Very truly yours,

Nicoletti Hornig & Sweeney

By: *John A. V. Nicoletti*

Managing Partner

**Nicoletti Hornig & Sweeney**

**Wall Street Plaza**

6/30/2008



**88 Pine Street**

**New York, New York 10005**

**Phone: (212) 220-3830**

**Fax: (212) 220-3780**

**Email: [jnicoletti@nicolettihornig.com](mailto:jnicoletti@nicolettihornig.com)**

**Web Site: [www.nicolettihornig.com](http://www.nicolettihornig.com)**

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**From:** David H. Fromm [<mailto:DHF@BrownGavalas.com>]  
**Sent:** Thursday, June 26, 2008 5:29 PM  
**To:** John A. V. Nicoletti  
**Subject:** LaFarge

John,

You can pick up the original Ratification at our office. Copy is attached.

Regards,

David H. Fromm  
BROWN GAVALAS & FROMM LLP  
355 Lexington Avenue  
New York, New York 10017  
(212) 983-8500  
[dhf@browngavalas.com](mailto:dhf@browngavalas.com)  
[www.browngavalas.com](http://www.browngavalas.com)

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# **EXHIBIT**

**"3"**

**John A. V. Nicoletti**

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**From:** Woods, John M. [JWoods@tpw.com]  
**Sent:** Friday, June 27, 2008 4:43 PM  
**To:** John A. V. Nicoletti  
**Cc:** Nooshin Namazi; David H. Fromm; Kevin O'Malley; Kozar, Jennifer S.; Stevenson, John R.; Anthony J. Pruzinsky; Robert G. Clyne  
**Subject:** RE: LaFarge

John,

For the sake of good order, we also confirm that the The American Club will not agree to a stipulation adding NYMAGIC as a party plaintiff. The request seems inappropriate since you would have to file an amended Complaint. Equally, the purported Ratification signed by NYMAGIC is incongruous because Rule 17 deals with issues concerning real parties at interest, not failure to join an indispensable party. Or are you are planning to substitute NYMAGIC for the present Plaintiffs?

Regards,

John M. Woods  
Thacher Proffitt & Wood LLP  
Two World Financial Center  
New York, New York 10281  
Tel: 212.912.7672  
Fax: 212.912.7751

---

**From:** John A. V. Nicoletti [mailto:JNicoletti@nicolettihornig.com]  
**Sent:** Friday, June 27, 2008 10:19 AM  
**To:** Anthony J. Pruzinsky; Robert G. Clyne; Woods, John M.  
**Cc:** Nooshin Namazi; David H. Fromm; Kevin O'Malley  
**Subject:** RE: LaFarge

Understood.

Very truly yours,

Nicoletti Hornig & Sweeney

By: *John A. V. Nicoletti*

Managing Partner

**Nicoletti Hornig & Sweeney**

**Wall Street Plaza**

**88 Pine Street**

**New York, New York 10005**

6/30/2008

**Phone: (212) 220-3830**

**Fax: (212) 220-3780**

**Email: [jnicoletti@nicolettihornig.com](mailto:jnicoletti@nicolettihornig.com)**

**Web Site: [www.nicolettihornig.com](http://www.nicolettihornig.com)**

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Fax: 212-669-0698/0699  
Mobile: 201-562-9004  
E-mail: [apruzinsky@hillrivkins.com](mailto:apruzinsky@hillrivkins.com)

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By: *John A.V. Nicoletti*

Managing Partner

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